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**DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL**
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Secretary

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Secretary's Order No. 2016-CZ-0050

Re: Delaware City Refining Company, LLC's Application for a Coastal Zone Act Permit for its Ethanol Marketing Project, at the Delaware City Refinery, 4550 Wrangle Hill Road, New Castle, New Castle County (CZA Permit No. 427P)

Date of Issuance: December 27, 2016
Effective Date: December 27, 2016

Pursuant to the Coastal Zone Act ("CZA"), 7 Del. C. Ch. 70, the Department's Regulations Governing Delaware's Coastal Zone, 7 Del. Admin. Code 101 ("CZA Regulations"), and other relevant authority, the Secretary of the Department of Natural Resources and Environmental Control ("Department") enters this Order following the public hearing held on October 26, 2016, the submission of written comments by interested persons, and consideration of the attached report and recommendations of the Hearing Officer ("Report"), on the application for a CZA permit filed on August 19, 2016, ("Application") by the Delaware City Refining Company, LLC ("Applicant").

The Department finds that the record established in the Report supports granting the Applicant a CZA permit for the Ethanol Marketing Project ("Project") proposed by the Application, as described below. The Department adopts the Report in all respects and makes additional findings as outlined below.

Delaware's Good Nature depends on you!

The Proposed Project

The Project involves the utilization of existing tanks and existing marine loading equipment at the refinery to enable denatured ethanol to be loaded from storage tanks to marine vessels and shipped to offsite facilities. The Project will use the existing equipment at the refinery's docking facility, which requires only minor modifications to ship ethanol since the docking facility currently receives shipments of ethanol. The anticipated ethanol shipment at the piers will be up to 10,000 barrels per day on an annual average basis as stated in the Application. The Project will not cause the crude unit throughput rate to exceed the benchmark of 191,100 barrels per day set by CZA Permit No. 355.

In 2005, the federal Environmental Protection Agency created a program that requires the use of renewable fuels (such as ethanol) in gasoline and other petroleum-based products. In 2006, the Department issued a status decision determining that the refinery was not required to obtain a CZA permit to receive ethanol (as a substitute for MTBE) by barge, to store and move ethanol on-site, to blend ethanol as a fuel additive, and to conduct related operations. The Department finds that the Project expands on existing marine operations by allowing the docking facility to load ethanol on to marine vessels to ship to off-site locations.

Findings On Legal Issues

The Department finds that the Project falls within the scope of permissible expansion of the Applicant's nonconforming use(s) under the CZA. In reaching this conclusion, the Department has considered alternative, opposing interpretations advanced by the Applicant and by persons and non-profit entities opposing the Application. The Applicant claims that the Project requires no CZA permit because it is consistent with

historic petroleum refining practices at the refinery. Conversely, persons opposing the Application contend that the Project, due to its off-site shipment by marine vessel, creates a new, prohibited bulk product transfer facility under the CZA. The Department finds that neither of these alternative interpretations is consistent with the CZA and its Regulations.

A. The Refinery And Its Integrated Docking Facility May Be Expanded By Permit.

Under Section 7002(f) of the CZA, a “nonconforming use” means “a use, whether of land or of a structure, which does not comply with the applicable use provisions in this chapter where such use was lawfully in existence and in active use prior to June 28, 1971.” The refinery is a nonconforming, otherwise-prohibited heavy industry use with an integrated docking facility - both of which were lawfully in existence and in active use prior to June 28, 1971. Under Section 7004(a) of the CZA, nonconforming uses may be expanded by permit. 7 *Del. C.* § 7004(a) (“all expansion or extension of nonconforming uses . . . [are] allowed only by permit.”).

The CZA regulations also contemplate the expansion of nonconforming uses by permit. CZA Regulation 6.3 states that a permit is required for “[a]ny new activity, with the exception of those listed in Section 5.0 of these regulations [uses not regulated] . . . proposed to be initiated after promulgation of these regulations by an existing heavy industry,” provided that the applicant satisfy the Department in addressing any “negative impact” on the six factors set forth in Section 7004(b). More generally, the Regulations confirm that the dual purpose of the CZA is to ensure environmental improvement in the Coastal Zone while at the same time providing industry with the needed flexibility to remain competitive in a global marketplace. CZA Regulations, Preamble, App. C, § 1.1. Reflecting that dual purpose, the Department’s Guidance For Implementation and

Interpretation of the Regulations Governing Delaware's Coastal Zone ("Guidance"), which is attached to the CZA Regulations, states that "each nonconforming use and new manufacturing uses can add new products, change existing products, increase production capacity, add new processes and modify existing processes or do any other activity so long as these activities are undertaken in a way that assures environmental improvement in the Coastal Zone; and undertaken in such a way that they meet the six criteria outlined in the Coastal Zone Act." CZA Regulations, App. C, § 1.2.

The Department also considered the decision of the Delaware Superior Court in a previous CZA matter involving the refinery, which construed Sections 7004(a) and (b) as follows:

Section 7004(a) of the Act provides that "all expansion or extension of nonconforming uses, as defined herein, and all expansion or extension of uses for which a permit is issued pursuant to this chapter, are likewise allowed only by permit." Subsection (b) provides that, when the Secretary makes a permitting decision, he must consider, "Economic effect, including the number of jobs created and the income which will be generated by the wages and salaries of these jobs in relation to the amount of land required, and the amount of tax revenue potentially accruing to state and local government."

This language makes it clear that the General Assembly did not intend to doom every existing, non-conforming use in the coastal zone to extinction by attrition. Instead, the legislature clearly expects the Secretary to make a judgment call on any proposed expansions, balancing environmental and economic factors to reach the best result for Delaware and its citizens. The reason for writing the Act this way is obvious. At issue is not a bar or junkyard whose loss would go unnoticed; it is a massive refinery [the DCRC refinery] directly or indirectly employing hundreds of people and providing millions of dollars in state tax revenues. Deciding to close it down by disallowing all competitive expansion, particularly expansion that lessens its pollution output, without considering all relevant factors, would contravene legislative intent."

Kearney v. Coastal Zone Industrial Control Board, 2005 WL 3844219, *5-6 (Del. Super. Ct. March 18, 2005), *aff'd*, 897 A.2d 767 (Table) (Del. 2006).

Applying these statutory provisions and regulations, and in light of the *Kearney* decision and other relevant authority, the Department concludes that the Application proposes activities that constitute an expansion or extension of the nonconforming use(s) at the refinery and its integrated docking facility. This expansion is allowable, where, as here, the Application satisfies the Section 7004(b) requirements necessary to obtain a CZA permit.

B. A CZA Permit Is Required

The Applicant contends that no CZA permit is required because the Refinery's nonconforming docking facility will transfer the same products and materials as it did in 1971 – defined broadly as petroleum products. The Department rejects this contention for two reasons. First, while ethanol may be considered a blendstock for petroleum products, the Applicant has not demonstrated that the storing and shipment of ethanol to or from the refinery's docking facility by barge was occurring in 1971 so as to be within the scope of its initial nonconforming use. Second, while a 2006 CZA status decision held that the off-loading of ethanol for the purpose of blending it with gasoline was not subject to CZA regulation, the Project contemplated by the Application would involve an expansion of operations to include shipment of ethanol beyond existing refining operations. In light of these considerations, the Project represents an operational expansion that requires the Applicant to meet the standards for permitting under CZA Section 7004 and CZA Regulation 6.3.

C. No New Bulk Product Transfer Facility Is Created

Public comments by persons opposed to the Project contend that the anticipated shipment of up to 10,000 barrels per day of ethanol (on an average annual basis) from the

Applicant's existing nonconforming uses (the refinery and its integrated docking facility) would convert the existing docking facility into a new bulk product transfer facility that is prohibited under the CZA. This contention is unpersuasive because it conflicts with the plain terms of the CZA.

Section 7002(b) of the CZA, which defines a "bulk product transfer facility" as "any port or dock facility, whether an artificial island or attached to shore by any means, for the transfer of bulk quantities of any substance from vessel to onshore facility or vice versa," expressly excludes from this definition a "docking facility or pier for a single industrial or manufacturing facility for which a permit is granted or which is a nonconforming use." Therefore, the integrated docking facility at the refinery is not a prohibited bulk product transfer facility but rather is a legally existing nonconforming use and a use for which a permit may be granted. The CZA does not prohibit the expansion of operations at a legally existing nonconforming refinery with an integrated docking facility. On the contrary, as noted above, Section 7004 specifically permits the expansion and extension of nonconforming uses so long as certain statutory criteria, designed to result in environmental improvements, are met.

The public comments by persons opposed to the Project mistakenly rely on CZA Regulation 4.6, which lists, as one of the prohibited uses or activities in the Coastal Zone, the "conversion or use of existing unregulated, exempt, or permitted docking facilities for the transfer of bulk products." Regulation 4.6 would prohibit, for example, the conversion of a legally existing docking facility into a new use as a bulk product transfer facility. However, Regulation 4.6 cannot reasonably be read to prohibit any operation by which the refinery's nonconforming docking facility, which historically has transferred petroleum-

related products, seeks to ship a blendstock because no “conversion” or new “use” of the facility is taking place. The Project will use the existing equipment at the refinery’s docking facility, which requires only minor modifications to ship ethanol since the docking facility currently receives shipments of ethanol. A broader reading of Regulation 4.6 would run contrary to Section 7004, Regulation 6.3, and the Guidance for Interpreting the Regulations. When read in harmony with the CZA and the Regulations as a whole, Regulation 4.6 does not prohibit the expanded operations contemplated by the Project, if a permit is obtained consistent with Section 7004.

Finally, public comments from the Delaware Audubon Society also state that “further CZA permitting for the DCRC should be suspended” due to alleged violations of a 2013 Secretary’s Air Permit Order addressing the shipment of crude oil from the refinery. However, as noted in the Technical Response Memorandum (“TRM”), the shipment of crude oil is a matter unrelated to this pending permit application for the Project and is being addressed separately.¹ This permitting process solely addresses whether the Project as proposed satisfies the requirements of the CZA and its regulations and is not intended to be a separate enforcement mechanism.

D. The Section 7004 Factors Are Satisfied

The Project is allowable only if the Department is satisfied that all of the six factors identified in Section 7004(b) are adequately addressed. As noted by the Department’s TRM, which is incorporated herein by reference, all Section 7004(b) factors are satisfied, including the requirement that applicants are required to more than offset the negative impacts of the project or activity that is the subject of the application for a Coastal Zone

¹ The alleged violation discussed by Delaware Audubon’s public comments is being addressed by a notice of violation issued by DNREC to DCRC on December 23, 2016.

permit. *See* CZA Regulation § 9.1.2. In particular, for the reasons set forth in the Secretary's Environmental Assessment Report dated September 28, 2016, the Department finds that the total anticipated increase in fugitive volatile organic compound ("VOC") emissions (0.8 tons per year) will be more than offset by the installation of a new vapor capture system at the trucking terminal that will result in the reduction of VOCs by 1.1 tons per year. The Department has also determined that no new information has been introduced into the record through the public comment period to warrant changing its position on the adequacy of the environmental offset. Therefore, the offset is approved as part of the approval of the CZA permit.

Conclusions

Accordingly, the Department finds and concludes that the record supports approval of the Application because it complies with the CZA and the CZA Regulations and supports the requested expansion or extension of use of a nonconforming use(s). The Department directs that the CZA permit be issued to the Applicant. The Department also enters the following conclusions:

1. The Department has jurisdiction and authority to issue a CZA Permit to the Applicant subject to the reasonable permit conditions deemed appropriate and consistent with the CZA's purposes included in the permit prepared by the CZA Program;
2. Ethanol throughput shipped out from Applicant's loading piers, Piers 2 and 3, shall not exceed 10,000 barrels per day on an annual average basis;
3. The Department's findings are based upon the record as presented. A change in these factors or the use of the Facility may result in a different determination. As such, the

Applicant should request a Coastal Zone Status Decision if future physical or operational changes are intended or implemented;


4. The Department provided adequate public notice of the proceeding and the public hearing in a manner required by the law and its regulations;

5. The Department held a public hearing in a manner required by the law and its regulations;

6. The Department considered all timely and relevant public comments in making its determination;

7. The Department carefully has considered all the factors to be considered in making a decision on a CZA permit application under the CZA and its Regulations; and

8. The Department shall publish legal notice of this Order and otherwise provide notice as to all affected persons in a manner consistent with the public notice required by the law and the Department's CZA Regulations, and shall publish the Order on the Department's web site.



David S. Small
Secretary

